

When an employee's personal views begin to impact on business

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Recently, Australian rugby star, Israel Folau took to Instagram to voice his controversial religious views to his 414,000 Instagram followers. His post stated that hell awaited "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters".

Rugby Australia has responded by issuing Folau with a notice for breach of the professional players' code of conduct. The code provides that players "must use social media appropriately", they must treat everyone fairly and with dignity and must not bring themselves, their team or rugby into disrepute. Folau is contesting the breach notice and a code of conduct hearing will be held soon.

Folau's case illustrates the thorny issue that many employers' are now facing, when an employee's contentious views are amplified by social media and begin to impact on business.

Grounds for dismissal?

The New Zealand courts have frequently considered the misuse of social media in the employment context. In *McKean v Ports of Auckland Ltd* (2011), an employee's column published in the union's quarterly magazine appeared to disparage foreign workers. The employer received 11 complaints from staff members who labelled the column offensive, disgusting, racially divisive and insulting. The Employment Court noted that an "employer's feelings of displeasure at what an employee has to say will not suffice to convert an employee's lawful actions into misconduct". However, it was held that the employee's actions were "inherently relevant" to the employment relationship and that the conduct had caused significant offence and upset to numerous people. The Court attached weight to the breadth of distribution of the magazine and stressed that the conduct constituted offensive behaviour prohibited by the collective agreement and thereby justified dismissal.

Other cases have also recognised that social media platforms, such as Facebook, are not "strictly private" forums and that posted comments may substantiate a dismissal or disciplinary action depending on the circumstances.

Where an employee expresses personal views that others may find offensive, the right to freedom of speech may be curtailed where it is evident an employee is in breach of their employment agreement and obligations or where there has been serious misconduct. Establishing a connection between the conduct complained of and the employee's job or employer, is key. In establishing this link, consideration should be given to any damage to the employer's business or reputation, whether the employee has acted inconsistently to their role within the business, the impact on other employees or perhaps the wider public and whether the necessary trust and confidence between the parties has been undermined.

Before reaching any decision, it remains critical that employers conduct a fair disciplinary process, in line with any disciplinary policies or procedures it may have in place.

After posting similar derogatory comments last year, Folau received a formal warning which made it clear that any future disrespectful social media posts would result in disciplinary action. Despite this warning, the Chief Executive of Rugby Australia commented, "Israel has failed to understand that the expectation of him as a Rugby Australia and NSW Waratahs employee is that he cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their sexuality". The widespread sense of public dissatisfaction towards Folau's comments, combined with the fact that high profile sponsors are threatening to remove their sponsorship, further illustrates the significant impact Folau's conduct is having on Rugby Australia and its image.

How can an employer best protect themselves?

Employers must always be able to justify their actions, both substantively and procedurally. The best way to do this in this context is to set clear expectations of employee conduct. Terms in the employment agreement and social media policies provide a mechanism through which employers can do this and therefore protect themselves. Such policies are particularly relevant to businesses who are sensitive to public opinion. Whilst Folau has a long road ahead of him, Rugby Australia's failure to insert social media restraints into his contract could lead to further complications given Folau's decision to challenge his termination.

Provisions in employment agreements should expressly state that the employee may be dismissed if their conduct (including on

social media) brings the employer into disrepute. Additionally, any social media policy should clearly set out the employer's expectations with regards to the use of social media both within and outside the workplace. The policy should stipulate that activity or posts that are critical of members of the workplace, inconsistent with the values of the business or which effect relationships in the workplace, are unacceptable and may constitute a breach of the policy. It should also put employees on notice that any breach of the policy may constitute serious misconduct and be cause for disciplinary action, up to and including dismissal.

The need for clarity in employment policies was highlighted in the case of *Cliff v Air New Zealand Ltd* (2006), where the Employment Court concluded that the employer had a reasonable expectation that long-standing employees would be familiar with internet policies. At the same time, it noted employees were entitled to clear and unambiguous statements of policy, particularly in cases where breach could lead to dismissal. Having clear policies regarding the improper use of social media and use which is to the employer's detriment, will safeguard employers when dismissing employees in cases where it is not a clear case of serious misconduct.

Employers should also take proactive steps to educate employees in the appropriate use of social media. Particularly if they hold public or senior positions in the organisation, which carry a greater risk of bringing the employer into dispute if they post inappropriately.

A line can be drawn in the employment context where employees express personal views that others may find offensive, and there are steps an employer can take when such views begin to impact on their business. In Folau's case, time will tell whether his decision to cross that line will be to his detriment.

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